In the

# United States Circuit Court of Appeals

For the Ninth Circuit

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No. 4051

ALASKA STEAMSHIP COMPANY, a corporation, *Plaintiff in Error*

*vs.*

BERNARD McHUGH, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NO. ONE

## Reply Brief of Plaintiff in Error

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As indicated upon oral argument of this case, one of the principal questions presented by the present writ of error is whether the Federal Employers' Liability Act of 1906 is effective or operative in the Territory of Alaska with respect to an action against a common carrier for personal injuries based upon a maritime tort as distinguished from one founded upon non-maritime tort. Upon this

opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail *throughout* the country. * * * And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. * * *

"In The Lottawanna, Mr. Justice Bradley, speaking for the court said: 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' * * * One thing, however, is unquestionable; the *Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country.* * * *' " (Italics ours.) *Southern Pac. Co. v. Jensen*, 61 L. Ed. 1086, 1098.

Following the opinion above quoted, the case of *Chelentis v. Luckenbach S. S. Co.*, 62 L. Ed. 1171, was decided, wherein the Supreme Court of the United States quoted from its former opinion and again, in very positive language, announced that the harmony and uniformity in the maritime law may

not be disturbed, since it was uniformity and consistency which was sought by the Constitutional grant.

"In Southern P. Co. v. Jensen, * * *; Chelentis v. Luckenbach S. S. Co., * * *; Union Fish Co. v. Erickson, * * *, and Knickerbocker Ice Co. v. Stewart, * * *, we have recently discussed the theory under which the general maritime law became a part of our national law, and pointed out the inability of the states to change its general features *so as to defeat uniformity*, but the power of a state to make some modifications or supplements was affirmed. And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling whenever suit may be instituted." (Italics ours.) *Western Fuel Co. v. Garcia*, 66 L. Ed. 210, 213, 214.

In *Grant Smith-Porter Ship Co. v. Rohde*, 66 L. Ed. 321, death resulted from injury resulting on board an incompleted hull, and was suffered by a man employed in constructing the vessel, which facts resulted in the Supreme Court holding that the services of the workman were non-maritime; upon the particular facts in that case, it was held that to apply the state death statute would not work material prejudice to the uniformity of the maritime law. However, that the first essential to the system of admiralty and maritime laws of the

United States is uniformity, was reiterated in the opinion. The language of the opinion says:

"This conclusion accords with Southern P. Co. v. Jensen, * * *; Chelentis v. Luckenbach S. S. Co., * * *; Union Fish Co. v. Erickson, * * *, and Knickerbocker Ice Co. v. Stewart, * * *. In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law can not materially affect any rules of the sea whose *uniformity is essential.*" (Italics ours.) *Grant Smith-Porter Ship Co. v. Rohde*, 66 L. Ed. 321, 325.

In the case of *State Industrial Commission v. Nordenholt Corp.*, 66 L. Ed. 933, since the injuries for which compensation was sought occurred on the dock and not upon navigable waters, it was held that the state compensation law did not work prejudice to the uniformity of the general maritime law, and therefore might afford a remedy to the injured man. Here again, however, the essential feature of the maritime law is recognized.

"Under the doctrine approved in Southern P. Co. v. Jensen, no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indem-

nity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' " *State Industrial Commission v. Nordenholt Corp.*, 66 L. Ed. 933, 937.

It may be suggested that the language of the cases cited was used with respect to state statutes or decisions, and that hence it is not binding upon this court in passing upon the application of the Federal Employers' Liability Act of 1906 in the present action. But beyond dispute the cases quoted show that by the United States Supreme Court the law is established to be that the Constiutional grant of admiralty and maritime jurisdiction to the federal government was intended for the purpose of preserving and developing uniformity and harmony in principles and rulings in that field, as well as in other matters entrusted to the national government and released by the several states.

Somewhat analogous to the Federal Employers' Liability Act of 1906 is that part of the Act of 1879 (Judicial Code, § 24 and § 256), known as the "saving clause." Both were enactments of

Congress. Both would, if given the meaning usually sought by personal injury plaintiffs, result in inconsistency in the operation of the maritime law in various jurisdictions. In many early opinions examination shows that the courts thought the "saving clause" preserved to a suitor the right to a common-law cause of action, varying in different states as the common law there was adopted and construed. Why was this Federal statute under which conflict interpreted otherwise—to preserve the uniformity of the maritime law. [*Schuede v. Zenith S. S. Co.*, 216 Fed. 566 (affirmed 61 L. Ed. 1369); *Chelentis v. Luckenbach S. S. Co.*, 62 L. Ed. 1171. By these decisions and others subsequently it has, in effect, been said that the "saving clause," although a national statute, may not disturb the uniformity of the maritime law.

Again, when by amendment to the "saving clause" through the Act of October 6, 1917, attempting to permit suitors suffering personal injuries from maritime torts to receive awards under state compensation laws, a federal statute was held invalid because in violation of the spirit of the Constitution which demands a national system of maritime laws uniform throughout the country. This conclusion was reached in the case of *Knickerbocker*

*Ice Co. v. Stewart*, 64 L. Ed. 834, where the court said:

"In Southern P. Co. v. Jensen (May, 1917) supra, we declared that under § 2, article 3, of the Constitution ('the judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction'), and § 8, art. 1 (Congress may make necessary and proper laws for carrying out granted powers), 'in the absence of some controlling statute the general maritime law as accepted by the Federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction:' also that 'Congress has paramount power to fix and determine the maritime law which shall *prevail throughout the country.*' And we held that, when applied to maritime injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution, and to that extent is invalid. 'The necessary consequence would be *destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish;* and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded.' * * *

"In Chelentis v. Luckenbach S. S. Co. (June, 1918), 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. Rep. 501, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said: 'Under the doctrine approved in Southern P. Co. v. Jensen, no states has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full

indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and *it would be bedestructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."* ' And, concerning the clause, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it,' this: 'In Southern P. Co. v. Jensen, we definitely ruled that it gave no authority to the several states to enact legislation which would work "material prejudice to the characteristic features of the general maritime law, or *interfere with the proper harmony and uniformity of that law in its international and interstate relations.*" ' * * *

"As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of

the Federal government was the fundamental purpose; *and to such definite end* Congress was empowered to legislate within that sphere.

"Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states,—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however, is unquestionable: the Constitution must have referred to a *system of law coextensive with, and operating uniformly in, the whole country.* * * *'

"And, so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. *The definite object of the grant was to commit direct control to the Federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.*

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their character-

istic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation *which embodies both the will and deliberate judgment of Congress.* The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established,—*it would defeat the very purpose of the grant.*" (Italics ours.) Knickerbocker Ice Co. v. Stewart, 64 L. Ed. 834, 838-841.

One of the objections noted by the Supreme Court in the case last quoted to allowing Congress to make operative compensation laws of the several states, is that such legislation as the Act of October 6, 1917, would permit to be operative without the deliberate judgment and will of Congress various state statutes. We think this remark of the supreme court is particularly pertinent in the present case in view of the fact that it certainly cannot be said that it was the intention of Congress to create any lack of uniformity in the maritime laws of the United States by making the Federal Employers' Liability Act of 1906 operative in the territories as to maritime torts, when the Act as

originally passed by Congress contemplated its validity not only in the territories but also in the states. The very purpose of the Act was to create uniformity rather than to destroy it.

With respect to the former decision of this court in the case of *Sanstrom v. Pacific Steamship Co.*, 260 Fed. 661, we find no inconsistency between the contention being made here by plaintiff in error and that previous decision. In the Sanstrom case it was only necessary for this court to hold that the plaintiff's cause of action was barred by the statute of limitations contained in the Federal Employers' Liability Act of 1906. So far as shown by the opinion it was not necessary to hold that the Act was in force to the extent of creating a cause of action for the injured man or of circumscribing the defenses of the defendant steamship company.

If the opinion by this court is deemed to mean that the Federal Employers' Liability Act of 1906 was entirely operative in Alaska and controlling as to the cause of action of one suffering injuries as result of maritime tort, then we must contend that the cases cited by the opinion decided by the Supreme Court of the United States do not support the conclusion of this court, because the cases cited

were both cases arising from non-maritime torts, one suffered by a railroad employe in the territory of New Mexico, and the other by a street railway employe in the District of Columbia.

However, as we interpret the opinion in the Sanstrom case, it is good law, established and recognized by other decisions of the courts of the United States, if it is read as meaning that although Sanstrom's cause of action was created by the maritime law unmodified by statute, the court in enforcing that law was permitted to resort to the non-maritime statutes in force within the territory to ascertain whether the plaintiff had been guilty of laches; for it has become settled that in entertaining suits filed either in admrialty or at common law upon claims for personal injuries or property damage, where the causes of action arise by virtue of the general maritime law entirely unaided by statute, the courts to determine whether the litigation has been instituted timely, may resort to local or non-maritime analogous statutes. Examples of such decisions are found in the following cases:

*The Keith City*, 14 Wall. 653, 20 L. Ed. 896.
*The Southwark*, 128 Fed. 149.
*Davis v. Smokeless Fuel Co.*, 196 Fed. 753.

*Lincoln v. Cunard S. S. Co.*, 221 Fed. 622.

*Elder, etc., Co. v. Talge Mahogany Co.*, 256 Fed. 65.

*Bonam v. Southern M. Corp.*, 284 Fed. 362.

Plaintiff in error therefore respectfully submits that the Federal Employers' Liability Act of 1906 was not operative to create or control the maritime cause of action involved in the present litigation, and that the judgment of the trial court should be reversed for the errors shown in the record.

Respectfully submitted,

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